Savant-Asia Sdn Bhd v Sunway PMI-Pile Contruction Sdn Bhd

FEDERAL COURT — CIVIL APPEAL NO 02–22 OF 2005(W)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), ARIFIN ZAKARIA AND HASHIM YUSOFF FCJJ
26 SEPTEMBER 2008

Civil Procedure — Disposal of action without trial — Disposal of case on point of law — Outcome of claim resting entirely on answer to question posed — Whether facts in dispute — Whether case suitable for determination under O 14A of the Rules of the High Court 1980

Companies and Corporations — Winding up — Discontinuance of — Debt fully paid to petitioner before advertisement of petition — Whether petitioner may discontinue winding up proceedings — Whether petitioner nevertheless obliged to advertise petition — Whether petitioner had to proceed to obtain court order to retain money paid by company

Companies and Corporations — Winding up — Petition — Advertisement of petition — Petition for winding up advertised in newspaper several months before hearing of petition — Debt fully paid to petitioner before advertisement of petition — Whether advertisement or petition invalid — Whether amounted to defamation — Whether petitioner nevertheless obliged to advertise petition — Whether advertisement of petition mandatory — Whether mere irregularity curable under r 194(1) of the Companies (Winding-up) Rules 1972 — Companies (Winding-up) Rules 1972 r 24

Tort — Defamation — Libel — Defence of absolute privilege — Advertisement of winding-up petition — Debt fully paid to petitioner before advertisement of petition — Whether advertisement amounted to defamation — Whether petitioner nevertheless obliged to advertise petition — Whether advertisement absolutely privileged

A winding up petition was filed by the appellant through its solicitors on 22 March 1999 in respect of a debt owed by the respondent. The hearing date was fixed on 3 September 1999. The petition was served on the respondent on 23 April 1999. On 4 May 1999, the respondent tendered a cheque to the

A appellant for the exact amount claimed. The cheque was cleared on 11 May 1999. The petition however was published in *The Star* newspaper on 12 May 1999. The respondent brought an action at the High Court against the appellant and the appellant's solicitors for libel on account of the advertising of the petition in *The Star* newspaper after the debt had been fully settled. B The appellant and the solicitors applied under O 14A and/or O 33 rr 2 and 5 of the Rules of the High Court 1980 ('the RHC') for the issue of absolute/qualified privilege raised in the pleading to be tried as a preliminary issue. The learned High Court judge dismissed the application holding that the advertisement was a mandatory requirement only if the appellant C intended to proceed with the hearing of the petition. The appellant's and the solicitors' appeal to the Court of Appeal was dismissed. Leave to appeal was granted by the Federal Court on the question whether, where a winding up petition on grounds of presumed insolvency under s 218(1)(e) of the Companies Act 1965 ('the Act') has been filed and served on a respondent D and the respondent pays the sum stated in the petition to the petitioner, the petitioner is excused from advertising the petition and surreptitiously keeps the money for himself to the exclusion of the other creditors and subsequently withdrawing the petition. The respondent also claimed that the advertisement was not made in accordance with r 24 of the Companies E (Winding-up) Rules 1972 ('Rules') since the advertisement was made on 12 May 1999, whereas the hearing date was fixed for the 3 September 1999.

F **Held,** allowing the appeal with costs:

(1) Section 219(2) provides that the winding up shall be deemed to have commenced at the time of the presentation of the winding up petition. Once the winding up petition has been duly presented, it sets in motion G the relevant provisions of the Act and the Rules vis-à-vis the respondent. The winding up petition was presented on 22 March 1999 and by virtue of s 219(2) of the Act, the winding up of the respondent was deemed to have commenced on that date. The payment of the debt on 11 May 1999 therefore came within the provision of s 223 of the Act H as disposition of the property of the respondent after the commencement of winding up and was void unless the court otherwise ordered. The appellant could not claim exclusive right to the money (see paras 21–22).

(2) The fact that no winding up order was ultimately made, was of no I consequence, as s 219 of the Act is not concerned on whether a winding up order is eventually made or not, but seeks to provide protection to unsecured creditors upon the date of presentation of the petition. Since winding up proceeding is a class action, there is therefore the need for it to be advertised as provided in r 24 of the Rules. Advertisement of the

petition is a mandatory requirement in a winding up proceeding and it cannot be dispensed with (see paras 24, 26 & 30).

(3) The fact the appellant had received payment of the debt was all the more reason for the need for the petition to be advertised. The respondent could not argue that it was able to pay its debt because under the Act, the respondent was deemed to be unable to pay its debt by its own failure to comply with the demand. The payment of the debt after the petition had been filed did not in any way alter the situation (see para 33).

(4) Under the scheme of the Act and the Rules, the advertisement was clearly mandatory and in the circumstances, the advertisement was absolutely privileged. This would fall squarely under the second category of absolute privilege as mentioned by Devlin LJ in *Lincoln v Daniels* [1962] 1 QB 237 (see para 34).

(5) In relation to the argument that the advertisement was not made in accordance with r 24, such non-compliances was a mere irregularity and was therefore curable under r 194(1) of the Rules. Further, since the advertisement was mandatory, the fact that the advertisement was done earlier than the prescribed time had no bearing on the appellant's defence (see paras 35–36). *GKM Amal Bhd v Bank Utama (M) Bhd* [2004] 2 MLJ 12 followed.

(6) The appellant's agreement to discontinue the legal proceedings after the cheque had been cleared was not binding on the basis that the advertisement is a mandatory requirement under r 24 of the Rules (see para 37).

(7) This was a fit and proper case to be decided under O 14A of the RHC. The outcome of the claim by the respondent rested entirely on the answer to the question posed which purely involved the application of the facts, which were not in dispute, to the relevant provisions of the Act and the Rules. The claim could be appropriately be disposed of under O 14A (see para 38); *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508 referred.

[Bahasa Malaysia summary

Satu petisyen penggulungan difailkan oleh perayu melalui peguamcaranya pada 22 Mac 1999 berkenaan hutang yang belum langsai oleh responden. Perbicaraan ditetapkan pada 3 September 1999. Petisyen tersebut disampaikan kepada responden pada 23 April 1999. Pada 4 Mei 1999, responden mengemukakan cek kepada perayu untuk jumlah tepat sebagaimana yang dituntut. Cek tersebut ditunaikan pada 11 Mei 1999. Walau bagaimanapun petisyen tersebut disiarkan di suratkhabar *The Star*

pada 12 Mei 1999. Responden mengambil tindakan di Mahkamah Tinggi terhadap perayu dan peguamcara perayu untuk fitnah bertulis kerana mengiklankan petisyen tersebut dalam suratkhabar *The Star* selepas hutang tersebut telah dilangsaikan sepenuhnya. Perayu dan peguamcara memohon di bawah A 14A dan/atau A 33 k 2 dan 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk isu perlindungan mutlak/perlindungan bersyarat yang dikemukakan dalam pliding untuk dibicarakan sebagai isu permulaan. Hakim Mahkamah Tinggi yang bijaksana yang menolak permohonan tersebut memutuskan bahawa iklan tersebut merupakan keperluan mandatori hanya sekiranya perayu bercadang untuk meneruskan perbicaraan petisyen. Rayuan perayu dan peguamcaranya ke Mahkamah Rayuan ditolak. Kebenaran untuk merayu diberikan oleh Mahkamah Persekutuan atas persoalan sama ada, di mana petisyen penggulungan atas dasar anggapan ketaksolvenan di bawah s 218(1)(e) Akta Syarikat 1965 ('Akta') telah difailkan dan disampaikan kepada responden dan responden membayar jumlah yang dinyatakan dalam petisyen kepada pempetisyen, pempetisyen dikecualikan daripada mengiklankan petisyen tersebut dan secara diam-diam menyimpan wang tersebut untuk dirinya daripada pengecualian pemiutang-pemiutang yang lain dan kemudiannya menarik balik petisyen. Responden juga mendakwa bahawa iklan tersebut tidak menurut k 24 Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah') memandangkan iklan tersebut dibuat pada 12 Mei 1999, manakala tarikh perbicaraan ditetapkan pada 3 September 1999.

Diputuskan, membenarkan rayuan dengan kos:

(1) Seksyen 219(2) memperuntukkan bahawa penggulungan dianggap bermula pada masa petisyen penggulungan disampaikan. Apabila petisyen penggulungan tersebut dikemukakan maka peruntukan-peruntukan Akta dan Kaedah-Kaedah digunakan vis-à-vis responden. Petisyen penggulungan dikemukakan pada 22 Mac 1999 dan menurut s 219(2) Akta penggulungan responden dianggap bermula pada tarikh tersebut. Oleh itu, bayaran hutang pada 11 Mei 1999 terangkum dalam peruntukan s 223 Akta sebagai pelupusan harta responden selepas bermulanya penggulungan dan adalah terbatal melainkan mahkamah mengarahkan sebaliknya. Perayu tidak boleh menuntut hak eksklusif kepada wang tersebut (lihat perenggan 21–22).

(2) Fakta bahawa tiada perintah penggulungan dibuat adalah tidak penting, memandangkan s 219 Akta tersebut tidak memberi penekanan sama ada perintah penggulungan tersebut dibuat ataupun tidak, tetapi bertujuan memberikan perlindungan kepada pemiutang tak bercagar pada tarikh penyampaian petisyen tersebut. Memandangkan prosiding penggulungan merupakan tindakan berkelas, oleh itu terdapat

keperluan untuk diiklankan seperti yang diperuntukkan dalam k 24 Kaedah-Kaedah. Iklan petisyen tersebut merupakan keperluan mandatori dalam prosiding penggulungan dan ia tidak boleh diketepikan (lihat perenggan 24, 26 & 30).

(3) Fakta bahawa perayu telah menerima bayaran hutang tersebut memberikan sebab untuk keperluan iklan tersebut diiklankan. Responden tidak dapat mempertikaikan bahawa dia mampu membayar hutangnya kerana di bawah Akta responden dikatakan tidak mampu membayar hutangnya atas kegagalannya sendiri untuk memenuhi tuntutan. Bayaran hutang selepas petisyen tersebut difailkan tidak mengubah situasi tersebut dalam apa jua cara (lihat perenggan 33).

(4) Di bawah skim Akta dan Keadah-Kaedah iklan tersebut dengan jelasnya adalah mandatori dan dalam keadaan tersebut iklan tersebut sememangnya diberi keutamaan. Ini terangkum di bawah kategori kedua perlindungan mutlak sepertimana yang dinyatakan oleh Devlin LJ di dalam kes *Lincoln v Daniels* [1962] 1 QB 237 (lihat perenggan 34).

(5) Berkenaan dengan hujah bahawa iklan tersebut tidak menurut k 24, ketakpatuhan tersebut hanyalah satu luar aturan dan boleh diatasi di bawah k 194(1) Kaedah-Kaedah. Selanjutnya, memandangkan iklan tersebut adalah mandatori, fakta bahawa iklan tersebut dilakukan lebih awal daripada masa yang ditentukan tidak mempunyai kesan ke atas pembelaan perayu (lihat perenggan 35–36). *GKM Amal Bhd v Bank Utama (M) Bhd* [2004] 2 MLJ 12 diikut.

(6) Perjanjian perayu untuk tidak meneruskan prosiding undang-undang selepas cek tersebut ditunaikan tidak mengikat atas dasar bahawa iklan tersebut merupakan keperluan mandatori di bawah k 24 Kaedah-Kaedah (lihat perenggan 37).

(7) Ini adalah kes yang sesuai untuk diputuskan di bawah A 14A KMT. Keputusan tuntutan oleh responden bergantung sepenuhnya pada jawapan kepada soalan yang dikemukakan yang melibatkan aplikasi fakta semata-mata, yang bukannya dipertikaikan, terhadap peruntukan Akta dan Kaedah-Kaedah yang relevan. Tuntutan tersebut dengan betul ditentukan di bawah A 14A (lihat perenggan 38). *European Asian Bank AG v Punjab and Sind Bank*[1983] 2 All ER 508 dirujuk.]

Notes

For a case on discontinuance of winding up, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1034.

For cases on disposal of case on point of law, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2537–2546.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 369–527.

For cases on petition, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1321–1456.

Cases referred to

Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447, SC (refd)

European Asian Bank AG v Punjab and Sind Bank [1983] 2 All ER 508, CA (refd)

Fairview School Bhd v Indrani a/p Rajaratnam (No 1) [1998] 1 MLJ 99 (refd)

GKM Amal Bhd v Bank Utama (M) Bhd [2004] 2 MLJ 12, CA (folld)

Kredin Sdn Bhd v Development & Commercial Bank Bhd [1995] 3 MLJ 304, CA (refd)

Lincoln v Daniels [1962] 1 QB 237, CA (folld)

United Stock Exchange, Limited, ex p Philp & Kidd, Re (1884) 28 Ch D 183 (folld)

Legislation referred to

Companies Act 1965 ss 218(1)(a), (e), (2)(a), 219, 219(2), 221(2)(b), 222, 223, 224, 226(4)

Companies (Winding-up) Rules 1972 rr 24, 27, 33(1)(a), (b), (c), 194(1)

Contracts Act 1950 s 24

Rules of the High Court 1980 O 14A, O 33 rr 2, 5

Appeal from: Civil Appeal No W-02–244 of 2004 (Court of Appeal, Putrajaya)

Loh Siew Cheang (Cindy Goh Joo Seong & Keith Goh Hong Yin with him) (Cheang Ariff) for the appellant.

Sadacharam Raman (K Venkateswara with him) (David Lingam & Co) for the respondent.

Arifin Zakaria FCJ:

BACKGROUND

[1] This is an appeal against the majority decision of the Court of Appeal dated 17 June 2005 (Abdul Aziz Mohamad JCA (as he then was) dissenting) in dismissing the appeal by the appellant.

THE FACTS

[2] The undisputed facts of the case are as follows.

[3] A petition for winding up was filed by Savant Asia Sdn Bhd ('the appellant') through its solicitors, Zaid Ibrahim & Co, on 22 March 1999 in respect of a debt of RM141,750 owed by Sunway PMI-Pile Construction Sdn Bhd ('the respondent'). The hearing date was fixed on 3 September 1999. The petition was served on the respondent on 23 April 1999. On 4 May 1999, the respondent tendered a cheque to the appellant for the exact amount of RM141,750. The cheque was cleared on 11 May 1999. The petition, however was published in *The Star* newspaper on 12 May 1999 despite the fact that the debt had been settled on 11 May 1999.

[4] The respondent brought an action at the High Court against the appellant for libel on account of the advertising of the petition in *The Star* newspaper on 12 May 1999 by the appellant after the debt had been fully settled. Joined as the second defendant in the High Court were the solicitors who acted for the appellant in the winding up proceedings ('the solicitors').

[5] The respondent alleged that there was malicious intention on the part of the appellant since the respondent has already settled the debt.

[6] In the libel action, the appellant and the solicitors were separately represented.

[7] Both the appellant and the solicitors deny that there was malicious intention on their part on the ground that there was a legal duty on their part to proceed with the advertisement of the petition notwithstanding the settlement of the debt by the respondent.

[8] In the course of the proceedings, the appellant and the solicitors applied under O 14A and/or O 33 rr 2 and 5 of the Rules of the High Court 1980 ('the RHC') for the issue of absolute/qualified privilege raised in the pleading to be tried as a preliminary issue before the trial of the action and all further proceedings to be stayed.

[9] The learned High Court judge after hearing submissions on 22 May 2003 on the suitability of the two summonses, directed the appellant to adopt the question as framed by the solicitors for the sake of convenience and to facilitate proceedings. The appellant did not object. The issue as framed reads as follows:

> Whether upon the facts as alleged in paragraphs 6, 7 and 10 of the statement of claim and the defence of absolute privilege and/or qualified privilege raised and pleaded in paragraph 23 and 24 of the statement of defence of the second defendant, the plaintiff's claim is maintainable in law and/or in fact by reason of absolute and/or qualified privilege.

[10] The application was dismissed. The learned High Court judge agreed that the advertisement is a mandatory requirement, but if and only if the appellant intends to proceed with the hearing of the petition. In his grounds of judgment, the learned judge expressed his finding in the following words:

> I have dismissed the defendants' applications on the ground that since there is an allegation by the plaintiff of malicious intent on the part of the defendants, which the defendants deny (hence there is a dispute on a material fact), I do not think that it is appropriate that I should consider the issue of qualified privilege as raised by the defendants as a preliminary issue and without the need for a trial. It would have been a different matter if malicious intent is not an issue, or that the allegation of malicious intent is not disputed by the defendants.
>
> Further, there is another difficulty: the defendants' application is based on a misconception of the law — the misconception being that under r 24 of the Company (Winding-Up) Rules 1972 it was mandatory for them to advertise the petition. True, it was mandatory for them to advertise the petition within the prescribed period: but it was only mandatory if the defendants intended to proceed with the hearing of the petition. In the present case, however, it was clear to the defendants that they had no reason to proceed with the petition as the debts had already been settled.

[11] The appellant and the solicitors appealed to the Court of Appeal.

COURT OF APPEAL

[12] Before the Court of Appeal, learned counsel for the appellant (the first appellant in the Court of Appeal) sought determination of the court on the issue of absolute privilege contending that that was the basis of its application and also the pleaded defence of the appellant. In adopting the same submission the solicitors contended that they were merely acting in the course of their duties in publishing the said advertisement.

[13] Tengku Dato' Baharuddin Shah JCA in dismissing the appeal, addressed the issue in the following manner:

> The basis of the respondents' claim is the appellants' insistence in publishing the advertisement despite having given the undertaking to withdraw the petition upon the clearance by the bank of the respondent's cheque for full payment of claim. While the second appellant denied any knowledge of the alleged settlement, the first appellant claimed to only know about the clearance of the cheque on the day the advertisement was published and at the same time claiming to act at all times on the advice of the second appellant. These are disputes of fact which can only be resolved by evidence at a full trial. Therefore as an issue of law the question posed failed the test of suitability for determination under O 14A as earlier mentioned. It also assumes facts not discernible from the statement of claim and defence, hence inappropriate for pretrial determination.

On the issue of absolute privilege, there is not only factual dispute but also misconception of the law. The first appellant claimed to cause the publication as part of his statutory obligation ie 'partial fulfillment' of the requirement of r 24. The second appellant purported to publish the advertisement 'pursuant to requirements in law'. The respondent's stand is that the petition is not required to be advertised unless the appellant is definitely proceeding with it and even then the publication may only be made within the period prescribed by r 24 ie seven clear days before the hearing date. Here the publication was done on 12 May 1999, well before the hearing date fixed on 3 September 1999 and despite the undertaking and settlement. Thus, whether there was any necessity to publish and whether such publication was done pursuant to the requirement of the law were neither proven nor admitted.

Furthermore, the line of defence taken gave the learned judge the impression that there was a misconception of the law on the part of the appellant that advertisement is mandatory once a petition is filed when the law appears to view publication outside the prescribed period as a breach of the rules and an irregularity. The proposed issue is therefore obscure and not discernible from pleadings. Particularly so when the pivotal averments in paras 9 and 10 of the statement of claim are still in dispute. In any event, s 221(2) of the Companies Act 1965 provides for the withdrawal of a winding up petition by the petitioner at any time.

For the aforesaid reasons, the issue as framed is neither suitable nor possible for determination under O 14A.

Order 33 r 2 of the RHC is apparently wider in scope as it encompasses 'any question or issue arising in a case or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise'.

In any event, the issue as framed incorporates both defences of absolute privilege and qualified privilege, hence two issues. Assuming that the facts are undisputed or admitted (when they are not) the answers would not dispose of the entire cause or matter unless held in the appellant's favour. It is not therefore a question that is appropriate for preliminary determination under O 33 as it would neither save time nor cost.

[14] Dato' Abdul Aziz Mohamad (dissenting) in his judgment held as follows:

After considering the submissions on both sides, I arrived at the conclusion that it was for the very reason that they had received full payment of their debt that the appellants had to advertise the petition. By virtue of s 219(2) of the Companies Act 1965 the winding up of the respondent company had commenced on 22 March 1999 when the winding up petition was presented. The money that the appellants received from the respondents on 11 May 1999 did not legally belong to the appellants alone because the payment constituted a disposition of the property of the respondent company made after the commencement of the winding up, which s 223 declares to be void in the absence of a court order otherwise. Other creditors, if there were any, had an interest in it. By virtue of s 226(4), if there had been a winding up order, it would operate in favour of them as well.

[15] Further down he added:

> The judge was speaking of 'malicious intent' in relation to the defence of qualified privilege. But although the issue that was framed for the appellants, which was an adoption of the issue framed by the winding up solicitors, included also the defence of qualified privilege, the appellants' application by summons in chambers concerned only the defence of absolute privilege. In any event the issue as adopted for the appellants concerned also the defence of absolute privilege, to which the question of malice would not be relevant and on which, if it availed the appellants, they would succeed in defeating the respondents' claim, making the defence of qualified privilege unnecessary. The learned judge therefore erred in dismissing the application on the first ground in not considering that the appellants also relied on the defence of absolute privilege and the issue posed also related to that defence.

THE ISSUES IN CONTENTION

[16] Leave to appeal was granted by the Federal Court on 28 September 2005 and the following question of law was posed to this court:

> Where a winding-up petition on grounds of presumed insolvency under s 218(1)(e) read together with s 218(2)(a) of the Companies Act 1965 has been filed and served on a respondent and the respondent pays the sum stated in the petition to the petitioner, whether under the legislative scheme of winding up of companies, a petitioner is excused from advertising the fact of the petition and surreptitiously keep the money for himself to the exclusion of the creditors at large of the respondent and subsequently withdrawing the petition that is unadvertised.

[17] Learned counsel for the appellant submitted before us that:

(a) the learned majority members of the Court of Appeal failed to fully appreciate the statutory purposes which the various provisions of the Companies Act 1965 ('the Act') and the Companies (Winding-up) Rules 1972 ('the WUR') seek to achieve when winding up has commenced upon presentation under s 219(2) of the Act. On the examination of the relevant provisions, the need to advertise is not dependent upon the subjective intention of a petitioner whether to proceed with the petition or not. Even if there was a bargain not to advertise, that bargain is unenforceable pursuant to s 24 of the Contracts Act 1950. If the statutory duty to advertise is dependent on the intention or bargain of the parties, it directly conflicts with the legislative scheme of winding up of companies; and

(b) a winding up petition under s 218(1)(e) read together with s 218(2)(a) of the Act immediately raises a rebuttable presumption of insolvency and the application of several statutory provisions affecting the conduct of the petitioner and the respondent under the Act and the WUR. The petition also cannot be withdrawn without leave under s 221(2)(e) of

the Act. The statutory characteristic of 'class remedy' of a winding up petition is revealed in several provisions of the Act. Once winding up has commenced, the Act operates prospectively and retrospectively in upholding the pari passu principle to protect the relevant class ie in this case the general body of unsecured creditors.

[18] The respondent's counsel on the other hand submitted that:

(a) the Federal Court cannot sanction and authorise the publication to the world at large by way of newspaper advertisements and *Gazette* notifications total falsehoods and lies;

(b) the basis of the Act and WUR as interpreted by judicial authority is to secure the payment of a debt, given the emphasis on non-payment and the judicial setting aside of unsubstantiated debts at hearing;

(c) the court's role is to apply the law practically and substantively to interpret statute accordingly to the facts of each case;

(d) where the debt is paid before the advertisement of a petition within the specific facts of this case, the appellant is not expected to proceed with advertisement of a winding up petition where the advertisement itself is false, there is no longer any locus standi to do so and where the respondent was clearly not a company unable to pay its debts as described under the statutory scheme of winding up;

(e) the appellant chose to disregard the fact that full payment had been made by not withdrawing the advertisement; and

(f) given the draconian nature and commercial repercussions of advertising a winding up petition with the undue and unwarranted prejudice to the respondent, this has resulted in an abuse to the winding up process and severe policy implications for business which have in good faith paid off their debts to continue with business.

OUR FINDING

[19] The single issue before us is whether a petitioner in a winding up petition may be excused from advertising the fact of the petition after the debt had been fully paid by the respondent. If the answer to this question is in the negative, then the appellant would succeed in its defence of absolute privilege.

[20] In this case, the payment was made by the respondent by cheque on 4 May 1999 and the cheque was cleared on 11 May 1999, well before the hearing date of the petition which was fixed on 3 September 1999. The respondent's contention simply put is that since payment had already been

made the petition no longer serves its purpose and the advertisement in the newspaper was no longer necessary and the appellant ought in the circumstances to have withdrawn the said advertisement.

[21] It is pertinent to note that the petition herein was grounded on the presumed insolvency under s 218(1)(e) read together with s 218(2)(a) of the Act. And under s 219(2), it is provided that the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up. This provision has many important consequences, one of which is that once the winding up petition has been duly presented, it sets in motion the relevant provisions of the Act and the WUR vis-à-vis the respondent. Hence the validity of the respondent's argument that since the appellant's debt had been fully settled by the date the advertisement was published in the newspaper, the appellant is therefore no longer obliged to advertise does not hold water. In this case, the winding up petition was presented on 22 March 1999 and by virtue of s 219(2) of the Act, the winding up of the respondent is deemed to have commenced on that date. Therefore, as from that date, the full rigour of the relevant provisions of the Act and the WUR would apply to the respondent.

[22] In this case, when the payment of debt was made on 11 May 1999, the winding up had already commenced. This payment, therefore, comes within the provision of s 223 of the Act as disposition of the property of the respondent after the commencement of winding up and is void unless the court otherwise orders. Thus, the appellant could not in the circumstances, claim exclusive right to the money paid. As Abdul Aziz Mohamad JCA (as he then was) correctly said, 'Other creditors, if there were any, had an interest in it'. It is important to note that winding up proceeding is a 'class right' or 'class remedy' as oppose to a writ action; this basic principle is embodied in the various provisions of the Act and the WUR, some of which will be considered in this judgment in due course.

[23] The prospective provisions that operate against the respondent are found in ss 222, 223 and 224 of the Act. They operate immediately upon the presentation of the winding up petition (see s 219(2)). The Court of Appeal in *Kredin Sdn Bhd v Development & Commercial Bank Bhd* [1995] 3 MLJ 304 explained the implication of s 219 of the Act in the following words:

> Thus, s 219 was enacted specially as a means to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their executing their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding up to the date when the order for winding up is made. During that period, the law sees to it that the assets or effects of the company will not be dissipated to enrich one or more unsecured creditors at the expense of the other

unsecured creditors. Section 224 preserves the assets and effects of the company, and it is to safeguard this underlying principle that there is this notion of a relation back that once a winding up order is made, it relates back to the date of the presentation of the winding up, ie the date when the winding up is deemed to have commenced. It follows that all attachments, sequestration, distress or execution put in force against the estate or effects of a company made within the interval of the presentation to wind up and the date when the order to wind up is made by the court, are void. The fact that no winding up order will ultimately be made makes no difference to this finding, as s 219 is not concerned whether a winding up order will ultimately be ordered or not, but that in mandatory tones it provides protection to unsecured creditors once a winding up is deemed to have commenced, that is upon the presentation of the petition. Thus, to say that protection is only present as and when the winding up order is eventually made is to go against the very intention of what Parliament had enacted. That protection arises once a winding up commences and the date of the commencement is nothing more than a question of fact ascertained from the date of the presentation of the winding up. For that reason, we consider that the decision reached in *Pembinaan KSY*'s case has been rightly made as opposed to the one in this appeal before us.

[24] One pertinent point to note is that the fact that no winding up order was ultimately made is of no consequence, as s 219 of the Act is not concerned whether a winding up order is eventually made or not, but seeks to provides protection to unsecured creditors upon the date of presentation of the petition.

[25] As a class action, the petitioner rank in pari passu with other unsecured creditors if any. Further, s 226(4) of the Act provides that the winding up order operates in favour of all creditors as if made on a joint petition.

[26] Since winding up proceeding is a class action, there is therefore the need for it to be advertised as provided in r 24 of the WUR. The relevant part reads:

Every petition shall be advertised in Form 4 seven clear days or such longer time as the Court may direct before the hearing, …

[27] The reason behind this provision is plain, that is, to give notice to other creditors of the petition. Under r 27 of the WUR, every contributory or creditor of the company shall be entitled to be furnished with a copy of the petition by the petitioner on payments of the prescribed rate. For these reasons we agree with the appellant's submission that there is no power conferred on the winding court to dispense with the advertisement.

[28] Rule 27 further provides that if the petitioner fails to advertise the petition, the petition shall be cancelled by the registrar and the petition shall be removed from the file unless otherwise directed by the judge or registrar.

[29] The importance of advertisement in the winding up proceeding was succinctly stated by Mahadev Shanker JCA in the case of *Fairview School Bhd v Indrani a/p Rajaratnam (No 1)* [1998] 1 MLJ 99 at p 107:

> The point to note here is that in a s 218 petition, the service is by advertisement. Consequently, all creditors and contributories are 'parties' who are deemed to be served and can participate in the proceedings. Whether or not they appear, they will be bound by the winding-up order because s 226(4) of the Act deems that a winding-up order is made on the joint petition of all creditors and contributories.

[30] And under the proviso to r 33(1)(a), (b) and (c) of the WUR, the court may substitute another as a petitioner. All these provisions operate on the basis that there had been due advertisement of the petition. In short, we would conclude by saying that advertisement of the petition is a mandatory requirement in the winding up proceeding and it cannot be dispensed with.

[31] We further agree with the submission of learned counsel for the appellant that the discretionary power given to the court under s 221(2)(b) to dispense with advertisement must be read purposively and cannot be interpreted to give power to court to grant a complete dispensation with the advertisement. To do so would run counter to the WUR. The dispensing power must be exercise according to the exigencies of each individual case. This is supported by the English case of *Re United Stock Exchange, Limited, ex p Philp & Kidd* (1884) 28 Ch D 183, where Pearson J held that the power of dispensation is wide but it cannot be exercised to frustrate the rule. He said at p 184:

> The form of advertisement provided is one which invites all creditors and contributories who wish, to appear and oppose. It is said the court may dispense with following the rule as to advertisements. No doubt the court has very wide dispensing power, but the court always exercises such power in such manner as to meet the exigencies of the particular case, and not to frustrate the rules, and *I am not aware of a single case in which the court has dispensed with advertisements, and said that the contributories are not to have the benefit of the rule, and I should be very much surprised if I myself had an application made to me to dispense with the rule*. (Emphasis added.)

[32] In *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447, our Supreme Court observed:

> ... The Companies (Winding up) Rules 1972 require that every petition shall be advertised, and in our opinion it is immaterial whether the effect of such advertisement in a particular case would result in damage being caused to the company proposed for winding up. If the advertisement would in fact cause such damage, this is not a ground to prevent a bona fide petitioner from advertising.

[33] In this appeal, we are only concerned with the defence of absolute privilege which was relied upon by the appellant. If our answer to the question posed herein is in the negative, then the appellant would succeed in his defence. As adverted to the above, we are satisfied that the advertisement is a mandatory requirement under the Act and the WUR. The fact the appellant had received payment of the debt is all the more reason for the need for the petition to be advertised. In any case, the petition herein is based on the deemed insolvency of the respondent under s 218(1)(e) read together with s 218(2)(a) of the Act. It arose out of failure of the respondent to pay its debt within three weeks from the service of demand on it. Therefore, the respondent cannot argue that it is able to pay its debt because under the Act, the respondent is deemed to be unable to pay its debt by its own failure to comply with the demand. The payment of the debt after the petition had been filed does not, in any way alter the situation.

[34] In the circumstances, we would agree with Abdul Aziz JCA that 'to omit to advertise the petition would directly assist the appellants to surreptitiously keep the money exclusively to themselves, in the event that there were other creditors'. Therefore, under the scheme of the Act and the WUR, the advertisement is clearly mandatory and in the circumstances, the advertisement was absolutely privileged. This would fall squarely under the second category of absolute privilege as mentioned by Devlin LJ in *Lincoln v Daniels* [1962] 1 QB 237.

[35] There is another point raised by the respondent in that the advertisement was not made in accordance with r 24 which stipulates that the advertisement must be made 'seven clear days or such longer time as the Court may direct before the hearing'. Here, the advertisement was made on 12 May 1999, whereas the hearing date was fixed for 3 September 1999. No order of court for such longer time was given. The respondent contends that the advertisement was in breach of r 24 of the WUR. In this connection, we would agree with the view expressed in *GKM Amal Bhd v Bank Utama (M) Bhd* [2004] 2 MLJ 12 that such non-compliances is a mere irregularity and is therefore curable under r 194(1) of the WUR.

[36] Further, since the advertisement is mandatory, the fact that the advertisement was done earlier than the prescribed time would have no bearing on the defence raised by the appellant. Even if it was done seven clear

days before the hearing date, it would still have the same effect on the respondent. The respondent is clearly on soft ground in as far as this point is concerned.

[37] On the issue that the appellant had agreed to discontinue the legal proceedings after the cheque had been cleared, we would hold that this could not be binding on the appellant on the basis of our earlier finding that the advertisement is a mandatory requirement under r 24 of the WUR. Therefore, such agreement would be invalid as it is against the express provision of the rule which is intended to protect other creditors. In any case as stated by Abdul Aziz JCA, the agreement merely states that the appellant had agreed to the discontinuance or withdrawal of the petition but it does not say that the respondent agreed to dispense with the advertisement.

[38] Finally, based on the view that we have taken, clearly, this is a fit and proper case to be decided under O 14A of the RHC on the single issue as posed to this court. The outcome of the claim by the respondent rests entirely on our answer to the question posed which purely involved the application of the facts which are not in dispute, to the relevant provisions of the Act and the WUR. On that premise, we hold that the claim may appropriately be disposed of under O 14A (see *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508).

CONCLUSION

[39] Accordingly our answer to the question posed is in the negative and it follows, therefore, that the appeal herein is allowed with costs both here and in the courts below. Deposit to be refunded to the appellant.

Appeal allowed with costs.

Reported by Kanesh Sundrum